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Cohabitation laws: Where do we go from here?

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Introduction

Over the past decade, figures from the Office of National Statistics show that across the UK cohabiting couples have more than doubled in number, making it the fastest growing family form.² The context of cohabitation is becoming increasingly diverse; with socio-economic factors, religion and ethnic background all playing an important role in the decision of whether or not to marry.³ In comparison to their married counterparts, cohabiting couples have little financial protection when the relationship ends or upon the death of a partner. It is not that cohabitants do not have any legal rights; instead the law has not yet developed a comprehensive approach to cohabiting couples. In some contexts, they are treated as if they were married, in others they are accorded lesser rights, and in others they have no rights at all, or at least none that are specific to their status as cohabitants. As a result, cohabiting couples have to resort to piecemeal legislation and a legal framework which often produces undesirable outcomes. Instances of inequity and hardship are widespread, and the results have been described as confusing, complex, usually inferior and hardly ever automatic.⁴

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² Office of National Statistics, *Families and Household in the UK* (2017) in 2017 cohabiting couple families reached 3.3 million. By contrast, there were 12.9 million married or civil partner couple families and this remains the most common type of family.

³ For example, see J Eekelaar and M Maclean, (2004) 'Marriage and the Moral Bases of Personal Relationships' 31 *Journal of Law and Society* 510; E van Acker 'Marriage and Values in Public Policy: Conflicts in the UK, the US and Australia' (Routledge, 2017).

⁴ A Barlow, S Duncan, G James and A Park, *Cohabitation, Marriage and the Law: Social Change and Legal Reform in the 21st Century* (Hart Publishing, 2005) at 2.

Proposals for reform have intensified in recent years, but as yet no action has been taken. This article does not presuppose what policy would be ideal for cohabitants, but instead examines the criticisms of the existing law and considers a possible way forward.

Proposed Reforms

In 2007, following consultation, the Law Commission recommended the introduction of a new scheme of financial relief on separation based on contributions made to the relationship by the parties (rather than on the respective needs of the parties as in divorce).⁵ The key features of the recommended scheme were that cohabiting couples who had satisfied certain eligibility requirements should be able to apply for financial relief on separation unless they had specifically opted out of the scheme.⁶ The applicant would also have to show that the respondent retained a benefit, or that the applicant had a continuing disadvantage, as a result of contributions made to the relationship.⁷ The level of financial relief would be determined by the court having regard to a list of discretionary factors, including the welfare of any relevant children, the financial needs, obligations and resources of both parties, and their conduct. In 2008, the government announced that no action would be taken to implement the scheme in England and Wales until research on the cost and effectiveness of similar principles introduced in Scotland could be studied.⁸ By 2011, the coalition government announced that the findings of the research into Scottish legislation did not provide a sufficient basis for a change in the law, and as a result it did not intend to take forward the Law Commission's recommendations for reform of cohabitation law.⁹ The scheme was not intended to provide cohabiting couples with the same rights as married couples and it was not intended that cohabiting couples would be obligated to meet each other's future needs.¹⁰

Since the Law Commission's recommendations, there have been a number of bills introduced by private members advocating the implementation of these proposals.¹¹ Previous bills have,

⁵ Law Commission, *Cohabitation: the financial consequences of relationship breakdown* Law Com No 307 (2007).

⁶ As above, para 3.24 couples who have had children together or who have lived together for a minimum period would be eligible. The Law Commission recommended that the minimum period for couples without children should be set within a range of two to five years.

⁷ As above, para 1.19.

⁸ Ministerial Statement to Parliament, Hansard HV vol 472 col 22WS (6 March 2008). For information on the operation of the scheme in Scotland, see the briefing paper issued by the Centre for Research on Families and Relationships, *'No longer living together: how does Scots cohabitation law work in practice?'* (2010).

⁹ Hansard HL, vol 730, col 15 – 16WS (6 September 2011).

¹⁰ Hansard HL, vol 730, col 15 – 16WS (6 September 2011).

¹¹ The first reading of the Cohabitation Rights Bill 2017 took place in July 2017, however the general debate on all aspects of the Bill is yet to be scheduled.

so far, failed to generate government support (amongst many reasons) on the basis that it would create a quasi-legal matrimonial structure based on an arbitrary length of time of cohabitation, and that it would be more beneficial for society to encourage marriage rather than cohabitation. The government has argued that rights and responsibilities that come with being a spouse should not be imposed on a couple that has chosen not to marry.¹²

Current law: jointly owned property

In order to understand the current position, an examination of the law applicable to cohabitants is necessary to understand what aspects of the law should be corrected through reform. In England and Wales, the court has the power to redistribute the assets of a divorcing couple by virtue of the Matrimonial Causes Act 1973.¹³ This enables the court to make a wide range of property orders regardless of the legal ownership of the property. The aim of the court in redistributing the assets is to ensure fairness between the parties¹⁴ by considering the financial needs of the parties, whether there should be compensation for economic disadvantage caused by the way the parties conducted their marriage, and the equal sharing principle which is derived from the basic concept of equality permeating a marriage.¹⁵

In stark contrast, there are no statutory rights protecting cohabitants on the breakdown of the relationship. Instead, cohabitants must rely on complex property and trust law to establish an interest in the home¹⁶. The court can only declare ownership of assets and there is no power in the court to redistribute property, therefore much will depend on whether the legal title is held solely or in joint names. If the property is held in the parties' joint names, there will be a presumption that the beneficial interest will be held jointly. However, this position is rebuttable if a joint owner can show that it was not the intention to hold the beneficial interest in equal

¹² Hansard HL Deb 12 Dec ember 2014, cols 2069-2096 .

¹³ When dividing the assets of the parties, a wide range of matters are taken into account, such as the housing and financial needs of the parties; their ages and the duration of the marriage; future earning capacity; their standard of living; and any disability of either party.

¹⁴ See *White v White* [2000] UKHL 54 at para 24-25 in seeking to achieve a fair outcome there is no discrimination between a husband who earned the money and the wife who looked after the home and the children and as such, fairness requires that their respective roles should not prejudice or advantage either party. Before reaching a firm conclusion and making an order as to the division of assets, a judge should check his tentative views against the 'yardstick of equality of division'. Equality should be departed from only if there are good reasons for doing so.

¹⁵ *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24 para 8 – 17

¹⁶ Under s.14 Trusts of Land and Appointment of Trustees Act 1996, claims can be made for an order declaring the nature and extent of person's interest in property and/or for an order for sale of the property. In determining an application, the court must have regard to the matters contained in s.15 of the Act.

proportions. If the parties have never discussed ownership of the property the court can draw inferences from the parties' conduct.

Current law: sole owned property

Where the legal title to property vests in one party, and there is no formal declaration of trust, the presumption is that 'equity follows the law'¹⁷ and the legal owner is entitled to the beneficial interest. If the other party has made a direct contribution to the purchase price,¹⁸ this gives rise to the presumption of a resulting trust and the contributor acquires a beneficial interest. Nevertheless, this presumption is rebuttable if it can be shown that there was no intention for the contributor to acquire an equitable interest.¹⁹ The problems in this area arise in situations where the parties are not joint legal owners and they cannot agree on their respective shares. In such cases the court must determine whether the legal owner holds the property on trust for another party who will have an equitable interest by virtue of a constructive trust.

Since *Lloyds Bank v Rosset*,²⁰ the courts have dealt with such constructive trust claims through a strict two stage process. First, the finding of a common intention between the parties to share the beneficial interest (a detrimental reliance on that common intention), and second, the quantification of that share.²¹ In *Rosset*, Lord Bridge stated that a common intention was "based on evidence of express discussions between the parties, however imperfectly remembered and however imprecise their terms may have been". Where there is no evidence to support a finding of an agreement or arrangement to share, inference can be drawn from the conduct of the parties.²² Lord Bridge further added that "direct contributions to the purchase price by the partner who is not the legal owner, whether initially or by payment of mortgage instalments, will readily justify the inference necessary to the creation of a constructive trust.....it is at least extremely doubtful whether anything else will do."²³ This suggests a restrictive approach to considering financial contributions and poses an obstacle that is too high.²⁴ This approach has been heavily criticised as it relies on evidence of either an express or implied common intention to share the ownership of the property and in many cases it is difficult to discern not only what

¹⁷ *Stack v Dowden* [2007] UKHL 17.

¹⁸ *Gissing v Gissing* [1971] AC 886. Indirect financial contributions such as paying the household bills will not give rise to a resulting trust.

¹⁹ *Re Sharpe (A bankrupt)* [1980] 1 WLR 219 a direct contribution to the purchase price by way of a gift or loan will rebut the presumption.

²⁰ [1991] 1 AC 107.

²¹ *Lloyds Bank v Rosset* [1991] 1 AC 107.

²² *Lloyds Bank v Rosset* [1991] 1 AC 107.

²³ *Lloyds Bank v Rosset* [1991] 1 AC 107.

²⁴ *Stack v Dowden* [2007] 1 FLR 1858.

each party might have intended, but also to identify commonly held intentions, assuming that they ever existed.²⁵

In *James v Thomas*,²⁶ the parties had cohabited for 15 years in a property acquired in the sole name of Mr Thomas. When the relationship ended the claimant sought a beneficial share of the home and relied on evidence that during discussion regarding improvement to the property, Mr Thomas had replied that “this will benefit us both”. The court found no evidence of an express common intention to share the beneficial title, instead Mr Thomas’ remarks were construed as statements regarding the shared use and enjoyment of the property. It is in the context of these uncertainties that it is clear that there needs to be a review of the current law on ownership of property by cohabitants.²⁷

Where it is not possible to find evidence of an express agreement to share, it will be necessary to infer an agreement by considering other factors. Unlike the restrictive approach in *Rosset*, in recent cases the courts have been willing to consider the “whole course of conduct in relation to the property”²⁸ and that the law has moved on since the strict approach on common intention in *Rosset*. In order for the court to ascertain what the parties intended, “many more factors than financial contributions may be relevant to divining the parties’ true intentions”.²⁹ These include the purpose for which the home was acquired; the nature of the parties’ relationship and the parties’ individual characters and personalities. Inferring common intention is not an easy feat as it depends on the judge’s analysis of the facts, which may render outcomes unpredictable, and quite possibly in contrast to the parties’ actual intentions.³⁰ Furthermore, there are limitations as to the types of conduct the courts will consider as sufficient to demonstrate an intention to share the beneficial ownership. Some decisions seem to accept that indirect financial contributions such as making a payment of the bills and therefore, enabling the owner to afford the mortgage, constitutes sufficient conduct.³¹ Conversely, inferring intention from

²⁵ Probert, Rebecca. (2008) ‘Equality in the Family Home?’ Feminist Legal Studies, 15: 341.

²⁶ [2007] EWCA Civ 1212, [2008] 1 FLR 1598.

²⁷ Bray, Judith. (2016) ‘Cohabitation: The long slow road to reform’ Fam Law, 1428-1437.

²⁸ *Stack v Dowden* [2007] UKHL 17.

²⁹ *Stack v Dowden* [2007] UKHL 17, see paragraph 69 for a full list of factors.

³⁰ Mee, John. (2012) ‘Jones v Kernott: Inferring and Imputing in Essex’. Conveyancer and Property Lawyer, 76:167.

³¹ *Lefoe v Lefoe* [2001] 2 FLR 970; *Gissing v Gissing* [1971] AC 886 per Lord Diplock: “The court is not entitled to infer a common intention to this effect from the mere fact that she provided chattels for joint use in the new matrimonial home; and there is nothing else in the conduct of the parties at the time of the purchase or thereafter which supports such an inference. There is no suggestion that the wife’s efforts or her earnings made it possible for the husband to raise the initial loan or the mortgage or that her relieving her husband from the expense of buying clothing for herself and for their son was undertaken in order to enable him the better to meet the mortgage instalments or to repay the loan”.

conduct is difficult and case law seems to suggest that the focus remains on an express agreement made between the parties or capital contributions.

Lessons from north of the border?

Under the Family Law (Scotland) Act 2006 (hereinafter 'the 2006 Act'), cohabitants, whether same sex or opposite sex, have limited rights to make claims against each other when the relationship ends or upon the death of one of the cohabitants. These provisions stem from the recommendations of the Scottish Law Commission that the law should strike a balance between protecting the autonomy of those who do not wish to marry and not undermining the institution of marriage.³² The Scottish government acknowledged that there have been major changes in the way families are built and every family is important no matter how it was formed.³³ Essentially, it was important to safeguard the best interests of children; promote and support stable families; and update the law to reflect the reality of family life in Scotland. Under section 28 the claimant may be entitled to some financial provision where a cohabitant has suffered an economic disadvantage due to the separation, or a party has derived an economic advantage from the other party's contributions. Ultimately, the remedies available under the 2006 Act are both practicable and fair. They do not impose upon cohabiting couples the responsibilities of marriage but redress the gains and losses flowing from their relationship.³⁴

The contrast between the treatment of cohabitants in Scotland and those in England and Wales is demonstrated in *Whigham v Owen*.³⁵ The parties had cohabited for 27 years and Ms Wingham sought a capital sum of one half of the parties' net assets. She argued that virtually all of the parties' wealth had been acquired during their cohabitation. Nevertheless, Mr Owen argued that Ms Wingham had not established any contributions that resulted in an economic advantage to her, nor any economic disadvantage suffered. In other words, Ms Wingham was no worse off at the end of the relationship than she was at the beginning. In considering the legal basis of the claim, the court considered that the overriding principle was one of fairness and not a precise economic calculation.³⁶ The court held that there was no necessity for Ms Wingham to show that there was a causal link between her contributions and Mr Owen's wealth

³² Scottish Law Commission, *Report on Family Law* (Scot. Law Com No.135, 1992), para 16.1.

³³ Scottish Executive, (April 2004) '*Family Matters: Improving Family Law in Scotland*'.
<http://www.gov.scot/Publications/2004/04/19220/35697> <accessed 29 January 2017>

³⁴ *Gow v Grant (Scotland)* [2012] UKSC 29.

³⁵ [2013] CSOH 29.

³⁶ See *Gow v Grant (Scotland)* [2012] UKSC 29 Lord Hope noted that it would be wrong to work on the basis that the legislation was entitled only to correct any clear and quantifiable economic imbalance and discouraged such a narrow approach.

at the breakdown of the relationship. The significance of the decision is that it marks a further step in the development of the application of s.28 of the 2006 Act.

Whilst the Act has had a positive impact for Scottish cohabitants and their children, the legislation has its limits. Section 28(2) of the Act gives the court a wide discretion to determine the outcome of a claim, but the Act does not provide any guidance as to how the court should exercise this discretion. According to the Scottish Executive, it was right and proper that the courts could consider any and all relevant factors in order to reach appropriate judgments.³⁷ This undoubtedly means that there may be inconsistencies and uncertainty as to the factors the court will take into account in the exercise of its discretion.

The application of the legislation is not an exact science and unlike the proposed English law reforms which includes a minimum cohabitation period of two years, the lack of a cohabitation requirement under the 2006 Act means that those in very short relationships could be eligible for statutory protection, should the court exercise its wide discretion.³⁸ The court also faces challenges in quantifying non-financial contributions, which can include looking after any relevant child or the home in which the parties cohabited.³⁹ Again, the 2006 Act does not provide any guidance or criteria and therefore those that the legislation was intended to protect may be at a disadvantage because their claim is difficult to quantify with any accuracy.⁴⁰

Future Directions?

So far, the debate over the reform of the laws relating to cohabiting couples tends to focus on the shortcomings of the law of trusts and the need for a legislative framework. While legislative reform is an option, the merit of pursuing that option should be reviewed in light of the range of other responses that would be worthy of exploration.

1. Better Public Legal Education (PLE).

The concern that the law does not adequately protect cohabitants has been the catalyst for empirical research studies over the past 15 years. A study carried out by The National Centre

³⁷ Scottish Executive, (April 2004) *'Family Matters: Improving Family Law in Scotland'*.
<http://www.gov.scot/Publications/2004/04/19220/35697> <accessed 29 January 2017>

³⁸ Guthrie, Tom and Hiram, Hilary. (2007) *'Property and Cohabitation: Understanding the Family Law (Scotland) Act 2006'* 11 Edin LR 208, 219.

³⁹ s.28(9) Family Law (Scotland) Act 2006.

⁴⁰ McCarthy, Frankie. (2011) *'Cohabitation: Lessons from North of the Border'* 23(3) CFLQ 277.

for Social Research⁴¹ of former cohabitants found that cohabitants were less likely to reach a settlement based on the parties respective needs, that homes owned by one party were always retained by the owner and jointly owned homes were either retained by one partner or sold. The arrangements that cohabitants made did not reflect their full legal entitlement, and the legal remedies that were available were rarely used. The study also found that cohabitants needed to be educated about the legal implications of their relationship. In light of the level of ignorance uncovered by the studies, the government launched the web-based Living Together campaign, which aimed to make people aware of the legal vulnerability of cohabitants as compared with their married counterparts and to give cohabitants practical advice and options to redress their legal position if they wish to do so.

A study into the effectiveness of the campaign⁴² found that the majority of the participants found the website useful and informative about their legal position. But despite this positive impact, few cohabitants had taken any measures to improve their legal position. For example, one of the main reasons for not improving their position was the perceived lack of suitable actions for cohabitants to take. Also, the discussion of financial affairs in the event of the relationship breaking down was considered difficult. A recent YouGov survey⁴³ of 1000 cohabiting couples revealed that 41% of cohabiting couples purchased their home as joint tenants and 40% purchased the property without any involvement from the other. Across the age groups surveyed, 54% of younger couples bought as joint tenants compared with 38% in the 55 plus age group. There will of course be a range of factors influencing home ownership (of which the survey does not address), however at the very least, the survey serves to highlight that the majority of properties are jointly owned but also that the problem of sole legal owner has not all but disappeared.⁴⁴

While public education may serve to provide cohabitants with a greater awareness and understanding of their rights, there are some obstacles to effective public education. These include isolated initiatives which lack the continuity and sharing of knowledge essential for

⁴¹ Tennant et al. (2006) *'Separating from cohabitation: making arrangements for finances and parenting'* Department of Constitutional Affairs.

⁴² Barlow et al. (2007) *'The Living Together Campaign – An investigation of its impact on legally aware cohabitants'* Ministry of Justice.

⁴³ Mills & Reeves. (2017) *'Foresight Myth busting the common law marriage'* <https://www.mills-reeve.com/our-new-survey-reveals-that-the-myth-of-the-common-law-marriage-leaves-cohabiting-couples-vulnerable-04-05-2017/> <accessed 1 September 2017>

⁴⁴ Auchmuty, Rosemary (2016) *'The limits of marriage protection in property allocation when a relationship ends'* CFLQ 303.

the spread of learning and short term funding of public legal education projects. In July 2017, the Attorney General's Office launched a new panel to drive forward legal education initiatives and to promote the importance of "teaching people about their legal rights and responsibilities",⁴⁵ it is unclear whether this includes matters relating to cohabitation.

2. Cohabitation Agreements

A cohabitation agreement generally deals with three key areas in relation to how the parties will own and share assets. First, establishing the financial arrangement while living together; second, who owns what at the time of the agreement, and third, how property, assets and finances should be divided should the couple separate.⁴⁶ Despite the increase in cohabiting couples in England and Wales, agreements regulating financial arrangements during the subsistence of the relationship and upon separation are underused. Much of this is partly due to a lack of awareness of their existence. According to the YouGov survey,⁴⁷ 76 per cent of participants had never heard of cohabitation agreements and only 10 per cent had an agreement in place.⁴⁸ This echoes the findings of the study into the impact of the Living Together Campaign. The study found that in theory cohabitants felt agreements were a good idea, but many were reluctant to enter into one due to the negative connotation and because they did not want to contemplate their relationship ending.⁴⁹ The study also found that the fact cohabitation agreements might not be legally binding was a reason why some did not enter into such arrangements.

Until fairly recently, the question of whether or not a cohabitation agreement is enforceable under English law had remained unanswered by the courts. At one point, such agreements were considered to be void on the ground of public policy (that they encouraged sexual

⁴⁵ <https://www.gov.uk/government/news/new-panel-launched-to-drive-legal-education> <accessed 6 January 2017>

⁴⁶ <http://www.advicenow.org.uk/guides/how-make-living-together-agreement#guideAccordians> <accessed 19 June 2017>

⁴⁷ Mills & Reeves (2017) 'Foresight Myth busting the common law marriage' <https://www.mills-reeve.com/our-new-survey-reveals-that-the-myth-of-the-common-law-marriage-leaves-cohabiting-couples-vulnerable-04-05-2017/> <accessed 1 September 2017>

⁴⁸ Mills & Reeves (2017) 'Foresight Myth busting the common law marriage' <https://www.mills-reeve.com/our-new-survey-reveals-that-the-myth-of-the-common-law-marriage-leaves-cohabiting-couples-vulnerable-04-05-2017/> <accessed 1 September 2017>

⁴⁹ Barlow et al. (2007) 'The Living Together Campaign – An investigation of its impact on legally aware cohabitants' Ministry of Justice.

immorality),⁵⁰ nevertheless, in *Sutton v Mishcon de Reya and Gawor and Co*⁵¹ the court confirmed that a cohabitation agreement that regulated the property and financial arrangements of a cohabiting couple was valid. It should be noted that even where an agreement is found to be valid, it could be unenforceable if it fails to comply with the general law of contract principles which governs these agreements. The court is more likely to find that there is an intention to enter into an agreement if it clearly governs the financial affairs of a cohabiting couple.⁵² Furthermore, if the terms are reasonable and each party has had separate independent legal advice, the agreements are likely to be legally enforceable, therefore this might encourage a few more couples to enter into such agreements.⁵³

Conclusion

When it comes to providing protection to cohabiting couples, England and Wales is some way behind Scotland and many other jurisdictions around the world. It is evident that there is a degree of confusion as well as a lack of clarity as to the rights afforded to those who cohabit. Property lawyers on the other hand have a different view on whether cohabitation is a problem with some considering the concept of family relationships as the problem to the purity and logic of the law of property.⁵⁴ Perhaps the answer is not legislative reform, but to better educate cohabitants about the existing law.

The most significant factor that impedes the achievement of reforms is the absence of government support for legislative reform. This argument resolves around the view that governments are reluctant to be seen as supporting a relationship type other than marriage. They have been of the opinion that if legislative reforms were made, cohabitation “would be as expensive and legalistic as divorce” and essentially if cohabitants are dissatisfied with the insecurity that cohabitation may bring then they should opt to marry instead.⁵⁵ The Law Commission’s recommendations have also been faced with scepticism in that while they are “doing much to address perceived injustices, these proposals are obviously not compatible with

⁵⁰ *Fender v St John-Mildmay* [1938] AC 1 Lord Wright said the law will not enforce an immoral promise, such as a promise between a man and a woman to live together without being married, or to pay a sum of money or to give some other consideration in return for an immoral association.

⁵¹ [2004] 1 FLR 837.

⁵² Law Commission, *Cohabitation: the financial consequences of relationship breakdown* Law Com No 307 (2007).

⁵³ Probert, Rebecca. (2009) *Cohabitation : current legal solutions*. Current Legal Problems, Vol.62 (No.1). 316-345 at 332.

⁵⁴ Probert, Rebecca. (2009) *Cohabitation : current legal solutions*. Current Legal Problems, Vol.62 (No.1). 316-345 at 332.

⁵⁵ Hansard HL Deb 12 December 2014, cols 2069-2096

a long-term national policy aimed at improving family stability by encouraging marriage and discouraging markedly more unstable cohabitation.”⁵⁶ As it stands, cohabiting couples will have to make do with the existing property and trusts law provisions and contractual natured agreements that can be entered into. The push to be fully recognised and protected as a family type under the existing law, like married couples, remains to be achieved.

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